

OCT 29 1976

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

76-602

GAY GURS, *Appellant,*

VS.

MARGOT W. GURS, *Appellee*

On Appeal from the Court of Appeal of the State of California,
First Appellate District, Division Three, From Judgment of
June 15, 1976 Which Judgment Became Final on
August 12, 1976 When the Supreme Court of
California Denied Hearing

JURISDICTIONAL STATEMENT

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No.

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June 15, 1976 Which Judgment Became Final on
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JURISDICTIONAL STATEMENT

Appellant appeals from the Judgment of the Court of Appeal of the State of California, First Appellate District, Division Three. This Judgment of June 15, 1976 in Case No. 1 Civil No. 38,281, affirming the dismissal of the Complaint in Case No. M 7133 by the Superior Court of Monterey County, California and upholding the constitutionality of California Civil Code §4803, became final on August 12, 1976 when the Supreme Court of California denied hearing of Appellant's Petition.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Appeal is not reported and will not be reported pursuant to the Order of the same Court, since the opinion carries a stamp "NOT TO BE PUBLISHED IN OFFICIAL REPORTS". Said Opinion is attached hereto as Exhibit "A".

JURISDICTION

The Complaint for Equitable Relief was filed in the Superior Court of Monterey County, Case No. M 7133 on August 12, 1975. Appellant (Plaintiff on the Complaint) asked the Superior Court that the Order of Marital Dissolution of that Court of April 22, 1972 and May 17, 1972 respectively, which held that Appellant's military retirement pay earned while the parties were residents and citizens of the State of Ohio, a non-community property state, was quasi-community property in California and thus the wife (Appellee here) is entitled to share in it, be varied since such holding is wholly repugnant to the Constitution of the United States pursuant to the Due Process and Equal Protection Clauses thereof. The Superior Court denied relief and ordered the Complaint to be dismissed without leave to amend on

the ground of *res judicata* on the 17th of October, 1975.

Notice of Appeal to the Court of Appeal was filed on November 12, 1975 and that Court after hearing oral arguments, filed its Opinion (Exhibit "A") on June 15, 1976 upholding the constitutionality of California Civil Code §4803 (called the "Quasi-Community Property Code") hereto attached as Exhibit "B" against Appellant's claim that the same is repugnant to the Constitution of the United States. Such ruling was bottomed on the earlier holding of the Supreme Court of California, *sub nomine*, *Addison v. Addison*, 62 Cal.2d 558, hereto attached as Exhibit "C".

Appellant then filed his timely Petition for Hearing in the Supreme Court of California, which Court denied hearing on August 12, 1976 on which date the Judgment, adverse to Appellant became final, thus the docketing of this Appeal is timely. The case of *North Dakota State Board v. Snyder Drug Stores*, 94 S.Ct. 407, 415 U.S. 156, 38 L.Ed. 2d 379, sustained the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal.

QUESTION PRESENTED

1. Can California Civil Code §4803 be considered constitutional, though clearly repugnant to the Fourteenth Amendment to the Constitution of the United States on the ground stated by the Supreme Court of California in *Addison v. Addison*, *supra*, that by so holding the Court and California Civil Code §4803

protects the innocent party in a marital dissolution case even though the *Addison* holding applied here subsequent to January 1, 1970 when the California Legislation adopted and put into effect Civil Code §§4500 and ff, which have done away with "fault" dissolution cases? (Exhibit "D" hereto attached)

2. Can the constitutionality of California Civil Code §4803 be upheld on the ground that the woman in a dissolution case is always the innocent party in face of the Civil Rights Act of 1964 pertaining to sexual discrimination? (Exhibit "E" hereto attached)

STATUTE INVOLVED

The so-called California Quasi-Community Property Statute, Civil Code §4803 which is hereto attached as Exhibit "B".

STATEMENT

As Appellant in his Petition for a Hearing by the Supreme Court of the State of California stated that he, Gay Gurs, was the Plaintiff in the case filed in the Superior Court of Monterey County under No. M 7133 and the Appellee, his former wife, Margot W. Gurs, was the Defendant in that case. The issue there presented was whether the California law which provides that the military retirement pay if vested at the time of the marriage dissolution proceedings (and even if it is not vested at that time) is community property applies to a former military man as Appellant here, who together with his wife was a

resident of a non-community property state at the time of the vesting of the military retirement pay and came with his wife to California and subsequently the marriage dissolution was prosecuted in that state.

The California law involved is bottomed on Civil Code §4803, the so-called "Quasi-Community Property" Statute which provides:

"As used in this part 'quasi-community property' means all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired as follows:

"(a) By either spouse while domiciled elsewhere which would have been community property had the spouse acquiring the property been domiciled in this state at the time of its acquisition."

As Exhibit "B" indicates this Code became operative on January 1, 1970.

Appellant maintained in his Complaint filed in the Superior Court of Monterey County that the California law which transmuted his retirement pay considered his separate property in his home state of residence, into quasi-community property, deprived him under the Constitution of the United States and of the State of California of equal protection and of due process. The trial court ruled adversely on the issues on the ground that the matter was *res judicata*.

Appellant appealed to the Court of Appeal of the State of California, First Appellate District, Division Three, wherein the case was filed under 1 Civil No. 38,281.

The Court of Appeal in its Opinion, which is hereto attached as Exhibit "A" affirmed the judgment of the trial court by holding that:

"The sole question is whether, under the doctrine of *res judicata*, the 1972 judgment bars the present action. It is not disputed that the 1972 judgment is long since final."

The Court of Appeal then summarized the Complaint filed in the Superior Court of Monterey County as follows:

"The core of appellant's argument appears to be an attack upon the constitutionality of the code provisions requiring equal division of quasi-community property. He points to his allegation that both he and his wife were residents of Ohio during his 24 years of military service. Thus, he says, his pension right 'vested' during that period. Since the spouses were residents of a state which does not recognize community property rights, he brought this 'vested' separate property right to California where the spouses became residents in 1963. He contends that the award to the wife thus deprives him of due process and denies him equal protection of the law. The code provisions involved (although not specifically cited by appellant) are Civil Code sections 4800 and 4803. The former requires that upon dissolution of a marriage, the court shall divide equally 'the community property and the quasi-community property of the parties.' Quasi-community property 'means all real and personal property, wherever situated' acquired 'by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this

state at the time of its acquisition.' (Civil Code § 4803). Appellant's contention, despite his view to the contrary, is not new. A 1965 decision upheld the constitutionality of a comparable quasi-community property statute (*Addison v. Addison*, 62 Cal. 2d 558), and completely disposes of appellant's several constitutional attacks."

The Opinion of the Court of Appeal relies in the main on the holding of the Supreme Court of California in *Addison v. Addison*, 62 Cal.2d 558, which Opinion is hereto attached as Exhibit "C". The Opinion of the Supreme Court of the State of California in the *Addison, supra*, case if analyzed shows that the Court of Appeal while relying on the holding of *Addison, supra*, did so in total disregard of the Civil Rights Act of 1964 (42 USC §1981 and ff) and particularly in disregard of the provision therein which forbids discrimination based on sex. The reliance by the Court of Appeal on the *Addison* holding discriminates against the male sex, and in this case against the Appellant.

Appellant believes, and he so submits, that the *Addison* holding stands for the proposition that public policy requires that the *innocent* party in a divorce proceeding be protected by applying the concept of the quasi-community property as it is incorporated in Civil Code §4803. That is clear because the California Supreme Court stated that:

"We are of the opinion that where the innocent* party would otherwise be left unprotected the

*Whether in 1965 when Justice Peters wrote the Opinion of the Supreme Court of California in *Addison, supra*, we still lived in

state has a very substantial interest and one sufficient to provide for a fair and equitable distribution of the marital property without running afoul of the due process clause of the Fourteenth Amendment. For the same reasons section 1 and 13 of Article I of the California Constitution, substantially similar in language, are not here applicable." 43 Cal. Rptr. 97 page 103.

The *Addison* case was decided as modified on April 14, 1965 prior to the time that the so-called no-fault marital dissolution law came into effect on January 1, 1970 in accordance with Civil Code §4500 and ff hereto attached as Exhibit "D". The Superior Court of Monterey County on April 20, 1972 and on May 17, 1972 awarded in a "no-fault" dissolution case part of Appellant's retirement pay to his wife as it appears on page 4 of the Complaint for Equitable Relief presented to this Court as part of the record. Thus, when the Superior Court Order was entered in a no-fault proceeding there could not have been and there is no showing whatsoever that Appellee was the guilty or the not guilty party nor was there any showing that Appellant was the not guilty or the guilty party. Applying however, as the Court of Appeal did, the *Addison* holding to this case, the Court must have

the age of "chivalry" or we already were enjoying the period of "Women's Lib", the fact is that at that time as now, the overwhelming majority of the military personnel were males and in consequence the separate property such as military retirement pay in a common law state was held by males and therefore the attempt to share in such separate property was on behalf of the female and that sex was undoubtedly considered the innocent party of the Supreme Court of the State of California in *Addison*, *supra*.

assumed that the male in a dissolution proceedings is *ipso facto* the guilty party. This may not be done in face of the Civil Rights Act of 1964 (42 USC §1981 and ff).

The Supreme Court of the State of California in its *Addison* opinion upheld the quasi-community concept, (i.e. Civil Code §4803) on the ground of Public Policy even though that Court was aware that prior decisions reached a contrary resolution. The Supreme Court of California in the *Addison*, *supra*, case stated:

"The problem arises as a result of California's attempt to apply community property concepts to the foreign, and radically different (in hypotheses) common-law theory of matrimonial rights. In fitting the common-law system into our community property scheme the process is of two steps. First, the property acquired by a spouse while domiciled in a common-law state is characterized as separate property. (*Estate of O'Connor*, 218 Cal. 518, 23 P.2d 1031, 88 A.L.R. 856.) Second, the rule of tracing is invoked so that all property later acquired in exchange for the common-law separate property is likewise deemed separate property." (*Kraemer v. Kraemer*, 52 Cal. 302) Thus, the original property, and all property subsequently acquired through use of the original property is classified as the separate property of the acquiring spouse."

Footnote No. 5 in the above quotation states as follows:

"5. It has been suggested that California might be constitutionally able to abrogate the tracing

rule and thus classify property acquired in California without inquiring as to the source of the funds used for the property's acquisition. See *Leflar, Community Property and Conflict of Laws* (1933) 21 Cal. L. Rev. 221, 229. This, however, does not appear to be the purpose and intent of the quasi-community property legislation."

The Opinion then goes on to say:

"One attempt to solve the problem was the 1917 amendment to Civil Code Section 164 which had the effect of classifying all personal property wherever situated and all real property located in California into California community property if that property would not have been the separate of one of the spouses had that property been acquired while the parties were domiciled in California. Insofar as the amendment attempted to effect personal property brought to California which was the separate property of one of the spouses while domiciled outside this state, *Estate of Thornton*, 1 Cal. 2d 1, 33 P.2d 1, 92 A.L.R. 1343, held the section was unconstitutional. The amendment's effect upon real property located in California was never tested but generally was considered to be a dead letter as the section was never again invoked on the appellate level."

The *Addison* case as we read it, attempted to overcome the holding of the majority of that Court in the *Estate of Thornton* (1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343) by relying on the dissenting Opinion of Justice Langdon who in his attempt to hold the amended Civil Code §164 constitutional stated:

"It is a rule of almost universal acceptance that the rights of testamentary disposition and of succession are wholly subject to statutory control, and may be enlarged, limited, or abolished without infringing upon the constitutional guaranty of due process of law."

The *Addison*, *supra*, case attempted to overcome the *Thornton* holding by stating:

". . . the correctness of the rule of *Thornton* is open to challenge. But even if the rule of that case be accepted as sound, it is not here controlling. This is so because former section 164 of the Civil Code has an entirely different impact from the legislation presently before us. The legislation under discussion, unlike old section 164, makes no attempt to alter property rights merely upon crossing the boundary into California. It does not purport to disturb vested rights 'of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him . . .' (*Estate of Thornton, supra*, 1 Cal. 2d 1, at p. 5, 33 P.2d 1, at p. 3) Instead, the concept of quasi-community property is applicable only if a divorce or separate maintenance action is filed here after the parties have become domiciled in California. Thus, the concept is applicable only if, after acquisition of domicile in this state, certain acts or events occur which give rise to an action for divorce or separate maintenance. These acts or events are not necessarily connected with a change of domicile at all."

Justice Peters then went on to say:

"It cannot be successfully argued that the quasi-community property legislation is unconstitu-

tional because of a violation of the due process clause of the federal Constitution . . .”

Then:

“The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment.” (33 Cal. L.Rev. 476, 495-496)

The holding of *Addison, supra*, as declared by the Supreme Court of the State of California is clearly bottomed on the understanding that the quasi-community property code is constitutional because it advances public welfare; and the frame of reference “to protect the interest of an innocent party in a divorce proceeding.” However, as matters now stand the no-fault dissolution proceedings do not tell us which of the parties is the innocent one and thus the underlying rationale disappears. Further the giving a part of the husband’s separate property, that is part of his military retirement pay to the wife runs afoul of the 1964 Civil Rights Act (42 USC §1981 and ff) because while some people would agree with the concept even though statistically it is improbable that every male in a marriage when the same is terminated will be *ipso facto* the guilty party. Applying the holding of the *Addison, supra*, case to the issues raised by Appellant here is in violation of the 1964 Civil Rights Act.

Appellant submits, as he also submitted to the Supreme Court of the State of California, that the

privileges and immunities clause of the Fourteenth Amendment are an issue here. Such is the case because if Civil Code §4803 is constitutional then a resident of a common law state such as Appellant here, may travel to California only if he is willing in case of a subsequent divorce proceeding, pay for the privilege of California residence by giving up part of his separate property, i.e. his military retirement pay.

Appellant submits that even assuming that the no-fault dissolution does not exist in California, even then the protection of the fiscal integrity of the so-called innocent party would not be sufficient to uphold the constitutionality of California Civil Code §4803, because it would bring about a clearly impermissible class legislation. It was said in *Memorial Hospital v. Maricopa County*, 94 S.Ct. 1076, 415 U.S. 250, 39 L.Ed.2d 306 by this Court that the State may not protect the public fisc by drawing an invidious distinction between classes of its citizens. If a state may not do so in the interest of the integrity of the public fisc how can it be permitted to invoke such invidious distinction to uphold the integrity or grant benefit the private fisc of a so-called innocent party in a dissolution proceeding. The classification is invidious here because only those people are deprived of their separate property as Appellant here, whose military retirement pay was vested while living in a common-law state and who came to this state hereafter where Appellee, the wife, filed dissolution proceedings here. As this Court also said in *Johnson v. Robison*, 94 S.Ct. 1160, 415 U.S. 361, 39 L.Ed.2d 389, that a clas-

sification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. This Court also said in *Gilmore v. City of Montgomery*, 94 S.Ct. 2416, 417 U.S. 556, 41 L.Ed.2d 304, that invidious discrimination is not subject to affirmative constitutional protection when it involves a state action.

Appellant submits that the holding of the Court of Appeal of California that Civil Code §4803 is constitutional runs afoul the decision of this Court in the *Memorial Hospital* case, *supra*, because there it was held that Arizona statute requiring a year's residence in the county as a condition to receiving non-emergency hospitalization or medical care at the county's expense creates an invidious classification that infringes on right of interstate travel by denying newcomers basic necessities of life and, absent a compelling state interest, is unconstitutional as a violation of the equal protection clause.

As in the *Memorial Hospital* holding so here it ought to be ruled that Appellant was penalized for his traveling interstate and coming to California and therefore demanding of him to give up part of his separate property that became vested while he was living, together with his spouse, in a common law state. Appellant also submits that holding Civil Code §4803 constitutional, the California Courts acted contrary to the equal protection clause of the Fourteenth Amendment as it was held by this Court in

Lubin v. Panish, 94 S.Ct. 1315, 415 U.S. 709, 39 L.Ed. 2d 702. It was said by this Court in *Jimenez v. Weinberger*, 94 S.Ct. 2496, 417 U.S. 628, 41 L.Ed.2d 363, that the equal protection clause enables a court to strike down a discriminatory law relating to status of birth where classification is justified by no legitimate state interest compelling or otherwise. In this case at bar, there is no legitimate state interest because the Supreme Court of California in *Addison*, *supra*, upheld the constitutionality of §4803 on the ground that the State has an interest to see to it that the innocent party in a marital dissolution proceeding be protected. However, as we have shown, there is no more fault recognized in the State of California as far as dissolution is concerned, and thus there is no more innocent party. *Jimenez*, *supra*, compels the striking down of the California Civil Code §4803 as unconstitutional.

This Court also held in *Gilmore v. City of Montgomery*, *supra*, that equal protection clause does not prohibit individual invasion of individual rights but prescribes state action of every kind that operates to deny any citizen the equal protection of the law. It is submitted that the upholding of the constitutionality of Civil Code §4803 denies Appellant here and others similarly situated the equal protection of the law.

Appellant further submits that upholding the constitutionality of Civil Code §4803 deprives him of due process. This Court held in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 94 S.Ct. 2080, 416 U.S.

663, 40 L.Ed.2d 452, that there cannot exist under the American flag any governmental authority untrammelled by requirement of due process. It was further said by this Court in *Johnson v. Robison, supra*, that although the Fifth Amendment contains no equal protection clause it does forbid discrimination that is so unjustifiable as to be violative of due process. In face of the enactment of Civil Code §4500 and ff and doing away with fault in dissolution cases it is submitted that the upholding of the constitutionality of Civil Code §4803 is so unjustifiably discriminatory as to be violative of due process. Because of the lack of due process and because of lack of equal protection as shown above, this Appeal ought to be considered and the upholding of the constitutionality of California Civil Code §4803 ought to be struck down.

THE QUESTIONS ARE SUBSTANTIAL

Appellant submits that the sanctity of the Fourteenth Amendment to the United States Constitution as well as the holding of due process of the Fifth Amendment are of so great weight that the Appeal herein submitted ought to be considered. It ought to be considered further because there is an interference with interstate travel by persons who are in a situation as is Appellant, namely who has a certain property vested in him as separate property while residing in a common law state and who is compelled to give up part of such acquired separate property to pay the price for the privilege of traveling to a

community law state such as California. As long as twenty-five years ago this Court held in *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 1511, that the constitutional limitation upon state power to interfere with interstate transportation of persons is not subject to an exception. This holding we read to the effect that Appellant, even though defendant in California in a divorce proceeding is still protected by the holding in *Edwards, supra*, and its progeny such as *Memorial Hospital, supra*. Therefore, Appellant submits that the judgment of the Court of Appeal in case 1 Civil No. 38,281 and that of the Supreme Court of California in *Addison v. Addison, supra*, ought to be reversed.

Appellant believes that the questions presented by this appeal are substantial and that they are of public importance.

Executed in Carmel, California this 22nd day of October, 1976.

Respectfully submitted,

FRANCIS HEISLER,

HEISLER, STEWART, SILVER & DANIELS,

Attorneys for Appellant.

(Exhibits Follow)

Exhibits

Exhibit "A"

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

*In the Court of Appeal
State of California
First Appellate District*

DIVISION THREE

**1 Civil No. 38281
(Sup. Ct. # M-7133)**

Gay Gurs,	} Plaintiff and Appellant,
vs.	
Margot W. Gurs,	
	} Defendant and Respondent.

[Filed June 15, 1976]

OPINION

In this "action for equitable relief", filed in 1975, plaintiff seeks to revise a 1972 judgment of dissolution of marriage. His complaint in the present action alleges that: he retired from the army December 31, 1962, and received a retirement pension based upon 24 years of service; he and defendant were married for 13 of his 24 years of army service; he and his wife both were residents of Ohio, not a community property state, during his entire army ser-

vice; during only 2.2 years of his army service was he stationed in California; he and his wife became California residents early in 1963; in 1971 his wife petitioned for dissolution of their marriage; judgment entered April 20, 1972 and amended May 17, 1972 awarded the wife 13/48ths (half of 13/24ths) of his monthly retirement benefits. The complaint prays that this allowance be reduced to half of 2.2/24ths of his retirement payments. Defendant demurred on the grounds of lack of jurisdiction and failure to state a cause of action. Her memorandum of points and authorities make plain that she relied upon the doctrine of res judicata. The demurrer was sustained without leave to amend. Plaintiff appealed. The order sustaining demurrer was not appealable, but judgment of dismissal has since been entered. We therefore treat the appeal as from the judgment of dismissal (6 Witkin, Calif. Proc., pp. 4314-4315) and as filed after entry of judgment. (Calif. Rules of Court, Rule 2, subd. c.)

The sole question is whether, under the doctrine of res judicata, the 1972 judgment bars the present action. It is not disputed that the 1972 judgment is long since final.

The core of appellant's argument appears to be an attack upon the constitutionality of the code provisions requiring equal division of quasi-community property. He points to his allegation that both he and his wife were residents of Ohio during his 24 years of military service. Thus, he says, his pension right "vested" during that period. Since the spouses

were residents of a state which does not recognize community property rights, he brought this "vested" separate property right to California where the spouses became residents in 1963. He contends that the award to the wife thus deprives him of due process and denies him equal protection of the law. The code provisions involved (although not specifically cited by appellant) are Civil Code sections 4800 and 4803. The former requires that upon dissolution of a marriage, the court shall divide equally "the community property and the quasi-community property of the parties." Quasi-community property "means all real and personal property, wherever situated" acquired "by either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition" (Civil Code, § 4803). Appellant's contention, despite his view to the contrary, is not new. A 1965 decision upheld the constitutionality of a comparable quasi-community property statute (*Addison v. Addison*, 62 Cal. 2d 558), and completely disposes of appellant's several constitutional attacks.

Nor do we find merit in appellant's argument that a fact issue is raised, thus barring determination of the res judicata issue by demurrer. His argument is based upon affidavits filed by him and by the attorney who represented him in the 1972 action. We need not consider whether material not pleaded is available either to support or oppose a demurrer, since these affidavits assert only that propriety of dividing the

pension was not raised by either party or brought to the attention of the court in 1972. But the 1972 judgment specifically awards the wife a fixed share of the pension. It is well settled that a decree determining property rights is *res judicata* as to any subsequent action concerning the rights to such property (*Kulchar v. Kulchar*, 1 Cal. 3d 467, 470; *Harley v. Whitmore*, 242 Cal. App. 2d 461, 469-470). Thus it is apparent on the face of the judgment that the issue was presented and determined. Appellant cites, and we find, no decision limiting *res judicata* to such issues as were in fact contested at a trial. Much less is it arguable that *res judicata* does not bar a specific contention available to but not spiritedly advanced by a party in the earlier proceeding. (See *Lunstand v. Kosanke*, 140 Cal. App. 2d 623, 627.)

Appellant also argues that a determination of a question of law is not conclusive "between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and *in any event it is not conclusive if injustice would result*" (*Louis Stores, Inc. v. Dept. of Alcoholic Bev. Control*, 57 Cal. 2d 749, 757). But the present cause of action is precisely the same as that of 1972, and is based upon the same events at the same dates. The rule of *Louis* is not applicable. Appellant, however, relies upon the *Louis* exception of situations in which "injustice would result." This argument seems to be based upon the view that divisibility of a military pension was not finally determined until the 1974 de-

cision (*In re Marriage of Fithian*, 10 Cal. 3d 592). Thus, it is contended, appellant's "mistake" in failing to raise the issue was justified, and injustice would result if he were not permitted to raise the argument now. But *Fithian* reviews in detail the developments of the law in this area, and shows that the ultimate determination was clearly signalled for some years. In any event, reargument of the question would be futile since *Fithian* itself lays to rest any doubt that the true rule is adverse to appellant. That decision and *Addison* (*supra*, 62 Cal. 2d 558) establish the asserted "mistake" of appellant in 1972 in truth was a correct interpretation of the applicable rules of law.

Judgment affirmed.

Draper, P. J.

We concur:

Brown (H.C.), J.

Emerson, J.*

*Retired Judge of the Superior Court, assigned by the Chairman of the Judicial Council.

Exhibit "B"

CALIFORNIA CIVIL CODE

§ 4803—Quasi-Community Property

As used in this part, "quasi-community property" means all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired as follows:

(a) By either spouse while domiciled elsewhere which would have been community property had the spouse acquiring the property been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

For the purposes of this section, personal property does not include and real property does include leasehold interests in real property.

(Added by Stats. 1969, c. 1608, p. 3334, § 8, operative Jan. 1, 1970.)

Exhibit "C"

(43 Cal.Rptr. 97, 399 P.2d 897)

L.A. No. 27167

Supreme Court of California
In Bank

March 15, 1965

As Modified on Denial of Rehearing
April 14, 1965

Leona Addison,	}
Plaintiff and Appellant,	
vs.	
Morton Cutler Addison,	}
Defendant and Appellant.	

PETERS, Justice.

Plaintiff Leona Addison (hereafter referred to as Leona) was granted an interlocutory decree of divorce from defendant Morton Addison (hereafter referred to as Morton) on the ground of his adultery. As part of that judgment the trial court held, *inter alia*, that the only community property was the household furniture and furnishings,¹ and that Morton was to pay

¹The judgment included the following provisions:

"10. All of the community property consisting of furniture and furnishings is awarded to plaintiff as her sole and separate property."

"12. That other than the furniture and furnishings awarded to plaintiff there is no community property and that all property standing in the name of the defendant MORTON CUTLER ADDISON is the whole and separate property of said defendant."

the current income tax liabilities for both Leona and himself, holding his wife harmless from such claims.² Both parties have appealed, Leona on the question of the extent of the community property, and Morton on his obligation to pay, without recoupment, the current income tax obligations.

At the time of their marriage in Illinois in 1939, Morton, having previously engaged in the used car business, had a net worth which he estimated as being between \$15,000 and \$20,000. Leona, however, testified that her husband's net worth was almost nothing at the time of their marriage. In 1949 the Addisons moved to California bringing with them cash and other personal property valued at \$143,000 which had been accumulated as a result of Morton's various Illinois business enterprises. Since that time Morton has participated in several California businesses.

On February 20, 1961, Leona filed for divorce and requested an equitable division of the marital property. On trial, Leona asserted two theories in support of her claim of property rights. The first was based upon statements Morton allegedly made to her indicating that she had a proprietary interest in property standing in his name alone, i. e., the theory of oral transmutation. In addition, Leona attempted to apply the recently enacted quasi-community property legis-

²"8. Defendant is ordered to pay all current income tax liabilities to the United States Government . . . and the current tax liability to the Government of the State of California . . . and is ordered to hold plaintiff harmless from such obligations." (Id.)

lation³ by contending that the property presently held in Morton's name was acquired by the use of property brought from Illinois and that that property would have been community property had it been originally acquired while the parties were domiciled in California.

The trial court found no oral transmutation of Morton's separate property into community property, a finding amply supported by the record, and held the

³The key sections of the 1961 legislation which are involved in the instant case are as follows:

Civil Code section 140.5: "As used in Sections 140.7, 141, 142, 143, 146, 148, 149 and 176 of this code, 'quasi-community property' means all personal property wherever situated and all real property situated in this State heretofore or hereafter acquired:

"(a) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property been domiciled in this State at the time of its acquisition; or

"(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

"For the purposes of this section, personal property does not include and real property does include leasehold interests in real property."

Civil Code section 146 provides in part: "In case of the dissolution of the marriage by decree of a court of competent jurisdiction or in the case of judgment or decree for separate maintenance of the husband or the wife without dissolution of the marriage, the court shall make an order for disposition of the community property and the quasi-community property and for the assignment of the homestead as follows:

"(a) If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property and quasi-community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just.

"(b) If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property and quasi-community property shall be equally divided between the parties."

quasi-community property legislation to be unconstitutional.⁴

The trial court, as noted above, did find the household furniture and furnishings to be community property and, pursuant to Civil Code section 146, awarded them to Leona. In addition, the court found that the residence of the parties was held in joint tenancy and thus each owned an undivided one-half separate interest therein. Finally, all other property which had been in Morton's name alone was found to be his sole and separate property.

The sociological problem to which the quasi-community property legislation addresses itself has been an area of considerable legislative and judicial activity in this state. One commentator has expressed this thought as follows: "Among the perennial problems in the field of community property in California, the status of marital personal property acquired while domiciled in another State has been particularly troublesome. Attempts of the Legislature to designate such personalty as community property uniformly

⁴The court announced: "[T]he Court feels that for that section [Civ.Code, § 140.5] to be applied as against the property in this case, which was brought from Illinois after years of marriage there and then years of living in residence in California, would be unconstitutional."

The trial court's declaration of its belief that the quasi-community property legislation is unconstitutional may be utilized to interpret its finding of fact as to the extent of community property held by the parties. (Union Sugar Co. v. Hollister Estate Co. 3 Cal.2d 740, 750, 47 P.2d 273; Estate of McAfee, 182 Cal.App.2d 553, 555, 6 Cal.Rptr. 79; Dahlin v. Moon, 141 Cal.App.2d 1, 4, 296 P.2d 344; People v. One 1951 Ford Sedan, 122 Cal.App.2d 680, 683, 265 P.2d 176.)

have been thwarted by court decisions." (Comment (1935) 8 So.Cal.L.Rev. 221, 222.)

The problem arises as a result of California's attempts to apply community property concepts to the foreign, and radically different (in hypotheses) common-law theory of matrimonial rights. In fitting the common-law system into our community property scheme the process is of two steps. First, property acquired by a spouse while domiciled in a common-law state is characterized as separate property. (Estate of O'Connor, 218 Cal. 518, 23 P.2d 1031, 88 A.L.R. 856.) Second, the rule of tracing is invoked so that all property later acquired in exchange for the common-law separate property is likewise deemed separate property.⁵ (Kraemer v. Kraemer, 52 Cal. 302.) Thus, the original property, and all property subsequently acquired through use of the original property is classified as the separate property of the acquiring spouse.

One attempt to solve the problem was the 1917 amendment to Civil Code section 164 which had the effect of classifying all personal property wherever situated and all real property located in California into California community property if that property would not have been the separate property of one of the spouses had that property been acquired while

⁵It has been suggested that California might be constitutionally able to abrogate the tracing rule and thus classify property acquired in California without inquiring as to the source of the funds used for the property's acquisition. See Leflar, Community Property and Conflict of Laws (1933) 21 Cal.L.Rev. 221, 229. This, however, does not appear to be the purpose and intent of the quasi-community property legislation.

the parties were domiciled in California.⁶ Insofar as the amendment attempted to affect personal property brought to California which was the separate property of one of the spouses while domiciled outside this state *Estate of Thornton*, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343, held the section was unconstitutional. The amendment's effect upon real property located in California was never tested but generally was considered to be a dead letter as the section was never again invoked on the appellate level.⁷

Another major attempt to alter the rights in property acquired prior to California domicile was the passage of Probate Code section 201.5.⁸ This section

⁶Sections 162 and 163 of the Civil Code defined separate property then, as they do now, essentially as that property acquired by each spouse before marriage in any manner and during the marriage by gift, bequest, devise or descent. Section 164, before being amended in 1961, included the following: "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; * * *."

⁷One of the results of the 1961 legislation, which established quasi-community property, was the repeal of the 1917 and 1923 amendments of Civil Code section 164, the substance of which is quoted in footnote 6, *supra*.

⁸As passed in 1935, Probate Code section 201.5 provided: "Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code." (Stats.1935, ch. 831, p. 2248, § 1.)

gave to the surviving spouse one half of all the personal property wherever situated and the real property located in California which would not have been the separate property of the acquiring spouse had it been acquired while domiciled in California. As a succession statute, its constitutionality was upheld on the theory that the state of domicile of the decedent at the time of his death has full power to control rights of succession. (*In re Miller*, 31 Cal.2d 191, 196, 187 P.2d 722.) In other words, no one has a vested right to succeed to another's property rights, and no one has a vested right in the distribution of his estate upon his death. Hence succession rights may be constitutionally altered. This theory was a basis of the dissent in *Thornton*.

In the present case, it is contended that *Estate of Thornton*, *supra*, 1 Cal.2d 1, 33 P.2d 1, is controlling and that the current legislation, by authority of *Thornton*, must be held to be unconstitutional. *Thornton* involved a situation of a husband and wife moving to California and bringing with them property acquired during their former domicile in Montana. Upon the husband's death, his widow sought to establish her community property rights in his estate as provided by the then recent amendment to Civil Code section 164.⁹ The majority held the section unconstitutional on the theory that upon acquisition of the property the husband obtained vested rights which could not be altered without violation of his privileges

⁹See footnote 6, *supra*.

and immunities as a citizen and also that "to take the property of A and transfer it to B because of his citizenship and domicile, is also to take his property without due process of law. This is true regardless of the place of acquisition or the state of his residence." (*Estate of Thornton*, supra, 1 Cal.2d 1, 5, 33 P.2d 1, 3, 92 A.L.R. 1343.)

The underlying rationale of the majority was the same in *Thornton* as it had been since *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228, 36 L.R.A. 497, which established, by a concession of counsel, that changes in the community property system which affected "vested interests" could not constitutionally be applied retroactively but must be limited to prospective application.

Langdon, J., in his dissent in *Thornton*, conceded the correctness of the vested right theory but argued that the statute was merely definitional, giving no rights to anyone except as provided by other legislation. Therefore, the widow would only be acquiring rights pursuant to a right of succession as granted by statute. As to the constitutionality of this application of amended Civil Code section 164 he declared: "It is a rule of almost universal acceptance that the rights of testamentary disposition and of succession are wholly subject to statutory control, and may be enlarged, limited, or abolished without infringing upon the constitutional guaranty of due process of law." (*Estate of Thornton*, supra, 1 Cal.2d 1, 7, 33 P.2d 1, 3.) The majority refused to construe amended Civil Code section 164 in this limited fashion.

The constitutional doctrine announced in *Estate of Thornton*, supra, has been questioned. Justice (now Chief Justice) Traynor in his concurring opinion in *Boyd v. Oser*, 23 Cal.2d 613, at p. 623, 145 P.2d 312, at page 318, had the following to say: "The decisions that existing statutes changing the rights of husbands and wives in community property can have no retroactive application have become a rule of property in this state and should not now be overruled. It is my opinion, however, that the constitutional theory on which they are based is unsound. [Citations.] That theory has not become a rule of property and should not invalidate future legislation in this field intended by the Legislature to operate retroactively."

The underlying theory of *Thornton* has also been questioned by several legal authorities in this field. (Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity? (1945) 33 Cal.L.Rev. 476; Schreter, "Quasi-Community Property" in the Conflict of Laws (1962) 50 Cal.L.Rev. 206; Comment, Community and Separate Property: Constitutionality of Legislation Decreasing Husband's Power of Control Over Property Already Acquired (1938) 27 Cal. L.Rev. 49, 51-55; see also Comment (1927) 15 Cal.L. Rev. 399.)

Thus, the correctness of the rule of *Thornton* is open to challenge. But even if the rule of that case be accepted as sound, it is not here controlling. This is so because former section 164 of the Civil Code has an entirely different impact from the legislation

presently before use. The legislation under discussion, unlike old section 164, makes no attempt to alter property rights merely upon crossing the boundary into California. It does not purport to disturb vested rights "of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him * * *." (Estate of Thornton, *supra*, 1 Cal.2d 1, at p. 5, 33 P.2d 1, at p. 3.) Instead, the concept of quasi-community property is applicable only if a divorce or separate maintenance action is filed here after the parties have become domiciled in California. Thus, the concept is applicable only if, after acquisition of domicile in this state, certain acts or events occur which give rise to an action for divorce or separate maintenance. These acts or events are not necessarily connected with a change of domicile at all.

It cannot be successfully argued that the quasi-community property legislation is unconstitutional because of a violation of the due process clause of the federal Constitution.¹⁰ Morton has not been deprived of a vested right without due process. As Professor Armstrong has correctly pointed out in her article, *supra*: "Vested rights, of course, may be impaired 'with due process of law' under many circumstances. The state's inherent sovereign power includes the so called 'police power' right to interfere with vested property rights whenever reasonably necessary to the

¹⁰The Fourteenth Amendment to the United States Constitution provides, in part: "• • • nor shall any State deprive any person of • • • property, without due process of law • • •."

protection of the health, safety, morals, and general well being of the people. The annals of constitutional law are replete with decisions approving, as constitutionally proper, the impairing of, and even the complete confiscation of, property rights when compelling public interest justified it.

" * * *

"The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." (Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity? (1945) *supra*, 33 Cal.L.Rev. 476, 495-496.)

Clearly the interest of the state of the current domicile in the matrimonial property of the parties is substantial upon the dissolution of the marriage relationship. This was expressly recognized by the United States Supreme Court in *Williams v. State of North Carolina*, 317 U.S. 287, at p. 298, 63 S.Ct. 207, at p. 213, 87 L.Ed. 279, where it was said: "Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal."

In recognition of much the same interest as that advanced by the quasi-community property legislation, many common-law jurisdictions have provided for the division of the separate property of the respective spouses in a manner which is "just and reasonable" and none of these statutes have been overturned on a constitutional basis.¹¹

In the case at bar it was Leona who was granted a divorce from Morton on the ground of the latter's adultery and hence it is the spouse guilty of the marital infidelity from whom the otherwise separate property is sought by the operation of the quasi-community property legislation. We are of the opinion that where the innocent party would otherwise be left unprotected the state has a very substantial interest and one sufficient to provide for a fair and equitable distribution of the marital property without running afoul of the due process clause of the Fourteenth

¹¹Because of the experience of the common-law jurisdictions it is the position of the California Law Revision Commission, whose recommendations formed the basis of the 1961 legislation, that where, as here, the divorce is granted on the ground of adultery, and it is the property of the adulterous spouse that is being divided as the court deems just, no valid constitutional objection can be raised. (See Marsh, A Study Relating to Inter Vivos Rights in Property Acquired by Spouse While Domiciled Elsewhere (1961) 3 Cal.Law. Revision Com.Rep., Rec. & Studies I-21, I-26, attached to the commission's report.)

Illinois, the former domicile of the Addisons, has no specific statutory authority granting a spouse a share in the other spouse's separate property upon divorce. However, in 1949 it enacted legislation authorizing a settlement of property in lieu of alimony (Ill.Rev.Stat. ch. 40, § 19 (1959)) and this statute has been frequently utilized in situations analogous to the instant case. (See Schwarz v. Schwarz, 27 Ill.2d 140, 188 N.E.2d 673; Smothers v. Smothers (Ill.) 182 N.E.2d 758; Savich v. Savich, 12 Ill.2d 454, 147 N.E.2d 85.)

Amendment. For the same reasons sections 1 and 13 of article I of the California Constitution, substantially similar in language, are not here applicable.

Morton also asserts that there is an abridgement of the privileges and immunities clause of the Fourteenth Amendment¹² citing Estate of Thornton, supra, 1 Cal.2d 1, 33 P.2d 1. As has been observed "The 'privileges and immunities' protected are only those that belong to citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources." (Hamilton v. Regents of the University of California, 293 U.S. 245, 261, 55 S.Ct. 197, 203, 79 L.Ed. 343, reh'g. den. 293 U.S. 633, 55 S.Ct. 345, 79 L.Ed. 717.) Aside from the due process clause, already held not to be applicable, Thornton may be read as holding that the legislation there in question impinged upon the right of a citizen of the United States to maintain a domicile in any state of his choosing without the loss of valuable property rights.¹³ As to this contention, the distinction we have already noted between former Civil Code section 164 and quasi-community property legislation is relevant. Unlike the legislation in Thornton, the quasi-community property legislation does not cause a loss of valua-

¹²"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *."

¹³Comment (1934) 8 So.Cal.L.Rev. 221, 225.

ble rights through change of domicile. The concept is applicable only in case of a decree of divorce or separate maintenance.

It is also argued that the legislation here under discussion may be unconstitutional under the privileges and immunities clause of section 2 of article IV of the United States Constitution. It is there provided that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The argument is that under the doctrine of *Spreckels v. Spreckels*, supra, 116 Cal. 339, 48 P. 228, California has refused to tamper with vested marital property rights of its own citizens and must therefore accord the same treatment to citizens of other states. As the United States Supreme Court has observed, "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." (*Toomer v. Witsell*, 334, U.S. 385, 396, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460,

rehg. den. 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389.) In the case at bar, Leona, as a former nondomiciliary of California, is a member of a class of people who lost the protection afforded them in Illinois had they sought a divorce there before leaving that state. (See Marsh, *Marital Property in Conflict of Laws* (1st ed. 1952) pp. 233-234 and cases cited in fn. 22.) She has lost that protection, and is thus in need of protection from California. Hence, the discrimination, if there be such, is reasonable and not of the type article IV of the federal Constitution seeks to enjoin.

Additionally, it is urged that the quasi-community property legislation is not applicable to Morton because the legislation was enacted subsequent to the filing of the cause of action but prior to the judgment. This position is untenable. (See *Peabody v. City of Vallejo*, 2 Cal.2d 351, 363-364, 40 P.2d 486, (the law at the time of judgment is controlling); see also *Tulare Dist. v. Lindsay-Strathmore Dist.*, 3 Cal. 2d 489, 526-528, 45 P.2d 972.)

Nor is the statute being applied retroactively. That is so because the legislation here involved neither creates nor alters rights except upon divorce or separate maintenance. The judgment of divorce was granted after the effective date of the legislation. Hence the statute is being applied prospectively.

It has been urged that the trial court's finding of the separate nature of the property was not based solely upon the legal question discussed above, but was predicated, in part, upon the evidence relating to the

manner in which that property was acquired. However, the trial court's finding on this issue (other than the general conclusion that the property held by the husband was his separate property) leaves doubt as to the basis of that determination. When first announcing his decision, the trial judge stated that his finding was based upon his assumption of the unconstitutionality of the statute. Subsequent to judgment, and on motion for new trial, he cast some doubt upon his former statement. Under the circumstances, we believe that the issue of the separate or community nature of the property should be tried under conditions wherein the trial court's determination of fact will not be colored by an erroneous belief as to applicable law.

It follows that the trial court was in error in refusing to apply the quasi-community property legislation to the case at bar.

As to Morton's cross-appeal on the question of the payment of taxes without recoupment from Leona,¹⁴ it has been conceded that if we reverse on Leona's appeal we must do likewise with the cross-appeal because if Leona is to have a share of the assets derived from the business, the trial court, in its discretion, may decide that she should be liable for a portion of the outstanding taxes.

The judgment is affirmed insofar as it decrees divorce and custody of the minor child. In all other respects the judgment is reversed and the cause

¹⁴See footnote 2, *supra*.

remanded to the trial court for retrial in accordance with the views herein expressed, Leona to recover costs on both appeals.

TRAYNOR, C. J., and TOBRINER, PEEK, BURKE, and
*SCHAUER, JJ., concur.

McCOMB, Justice (dissenting).

I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Ford in the opinion prepared by him for the District Court of Appeal in *Addison v. Addison*, Cal.App., 40 Cal.Rptr. 330.

Rehearing denied; McCOMB, J., dissenting, Mosk, J., not participating.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Exhibit "D"

CALIFORNIA CIVIL CODE

§4506—Ground for dissolution or legal separation.

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity.

(Added by Stats. 1969, c. 1608, p. 3324, §8, operative Jan. 1, 1970)

§4507—Irreconcilable differences defined.

Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved.

(Added by Stats. 1969, c. 1608, p. 3324, §8, operative Jan. 1, 1970)

§4509—Evidence of specific acts of misconduct.

In any pleadings or proceedings for legal separation or dissolution of marriage under this part, including depositions and discovery proceedings, evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue, or at the hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences.

(Added by Stats. 1969, c. 1608, p. 3325, § 8, operative January 1, 1970. Amended by Stats. 1969, c. 1609, p. 3355, § 14, operative Jan. 1, 1970.)

Exhibit "E"

CIVIL RIGHTS ACT

42 USC §1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 USC §1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

42 USC §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 USC §1984 provides:

"All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court."

42 USC §2000e-9 provides:

"Nothing in this sub-chapter shall prohibit classification and assignment for reasons other than race, color, religion, *sex* or national origin." [Emphasis added]

42 USC §2000h-2 provides:

"Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, *sex* or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action." [Emphasis added]

42 USC §2000h-4 provides:

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision

of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-602

GAY GURS, *Appellant*,

VS.

MARGOT W. GURS, *Appellee*.

Op Appeal from the Court of Appeal of the State of California,
First Appellate District, Division Three, From Judgment of
June 15, 1976 Which Judgment Became Final on
August 12, 1976 When the Supreme Court of
California Denied Hearing

MOTION TO DISMISS
For Lack of Jurisdiction Pursuant to Rule 16
Revised Supreme Court Rules

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Appellee submits this motion to show the Supreme Court of the United States that it has no jurisdiction to consider the appeal and there is no substantial federal question presented.

OPINION BELOW

The opinion of the Court of Appeal is not reported and will not be reported pursuant to the Order of the same Court, since the opinion carries a stamp "NOT TO BE PUBLISHED IN OFFICIAL REPORTS". Said Opinion is attached to the Jurisdictional Statement as Exhibit "A".

STATEMENT OF THE CASE

The complaint which forms the basis for this appeal was filed in the Superior Court of the State of California in and for the County of Monterey, Case No. M 7133 on August 12, 1975. Appellant (Plaintiff therein) sought equitable relief from a Judgment of Marital Dissolution entered May 17, 1972. That Judgment became final on July 16, 1972. Appellant alleged in his complaint that the Judgment dividing his military retirement pension as quasi-community property was unconstitutional because he was a non-resident of the State of California at the time the pension rights were earned. Appellee (Defendant therein) filed a demurrer to that complaint asserting the doctrine of res judicata as the matter had been conclusively decided in the earlier dissolution proceeding.

The Superior Court ordered the demurrer sustained without leave to amend on the ground of res judicata and entered Judgment of Dismissal nunc pro tunc as of October 17, 1975.

Notice of Appeal to the Court of Appeal was filed on November 12, 1975. The opinion concluded that the doctrine of res judicata was properly applied and affirmed the Superior Court's Judgment of Dismissal. The opinion also contains dicta which discusses and rejects Appellant's claim of un-constitutionality. Notice of Appeal was thereafter filed with this Court.

QUESTIONS PRESENTED

1. Does the doctrine of res judicata bar the re-litigation of the issue of the division of quasi-community property once a Marital Dissolution Judgment has become final.
2. If not, is there a substantial federal question concerning the constitutionality of Section 4803 of the California Civil Code.

ARGUMENT

Appellant ignores the doctrine of res judicata in his Jurisdictional Statement. Appellee submits that the doctrine is dispositive of the case in that the so-called federal question was neither timely nor properly raised.

The following facts are uncontroverted.

Appellee herein filed a Petition for Dissolution of Marriage in Monterey County, State of California, on August 23, 1971. Appellant herein filed a Response

to the Petition on or about November 12, 1971. Both Appellee and Appellant were residents of California at the time the Petition for Dissolution of Marriage was filed.

The Court, after the trial of the issues where both parties appeared and were represented by counsel, granted a Judgment on May 17, 1972 awarding, among items of community property, a fixed share of Appellant's military retirement to appellee.

Appellant did not appeal from the Judgment dissolving the marriage of the parties.

In August, 1975, Appellant herein filed an action against the Appellee in the Superior Court, Monterey County, alleging that at the time that Appellant's military retirement vested both Appellant and Appellee were residents of a non-community property state. A copy of said complaint is attached hereto as Exhibit "A".

Appellee demurred to the complaint on the ground that the issue presented by the complaint had been litigated in the prior action for dissolution of marriage in 1972.

The trial court sustained Appellee's demurrer to Appellant's complaint on the ground of res judicata, without leave to amend. Judgment of Dismissal was entered.

The Court of Appeal of the State of California, First Appellate District, Division Three, sustained the trial court's decision and affirmed the Judgment.

The Supreme Court of the State of California denied hearing on August 12, 1976.

It can be seen from the Complaint for Equitable Relief that there is no allegation of excuse, mistake or fraud. It is clear under California law that in these circumstances the doctrine of res judicata is a complete bar to the re-litigation. *Kulchar v. Kulchar*, 1 Cal.3d 467 (1969).

The Supreme Court of the State of California in its Opinion in *Kulchar*, supra, analyzes the doctrine of res judicata as it applies to the division of property rights in a dissolution case. It also enumerates the circumstances when the doctrine would not apply. Because of its appositeness to the instant fact situation it is attached hereto and marked Exhibit "B".

It should be emphasized that if a litigant has had a fair opportunity to present his case he will not be afforded equitable relief to set a final judgment. *Kulchar v. Kulchar*, supra.

The California Supreme Court restated the policy underlying the doctrine of res judicata in the recent case of *In re Crow*, 4 Cal.3d 613, 623 (1971).

"The doctrine of res judicata in civil matters rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination."

Thus, according to the settled California law, the time for raising the so-called federal question has

long since passed. The Judgment of Dissolution became properly final and there is no cause to un-do that decision.

The Opinion of the California Court of Appeal (Exhibit "A", Jurisdictional Statement) discusses and rejects Appellant's constitutional argument. Appellee submits that the discussion therein is dicta because Appellant has no standing to raise the issue due the direct estoppel of res judicata.

Notwithstanding that, the merits of Appellant's positions are discussed below.

The Fourteenth Amendment of the United States Constitution does not prohibit a state legislature from passing a law affecting the property rights of the citizens of that state, so long as the law bears a reasonable relationship to a legitimate state interest. *Smith v. King*, 277 F.Supp. 31, affirmed 88 S.Ct. 2128, 392 U.S. 309, 20 L.Ed.2d 1118; *Browden v. Gayle*, 142 F.Supp. 707, affirmed 77 S.Ct. 145, 352 U.S. 145, 1 L.Ed.2d 114; *McLaughlin v. State of Florida*, 85 S.Ct. 283, 379 U.S. 184, 13 L.Ed.2d 222, on remand 172 So.2d 640. Appellant does not dispute this long-standing principle of constitutional law.

Appellant argues that the protection of an "innocent" party to a divorce was the sole state interest upon which the Court in *Addison v. Addison*, 43 Cal. Rptr. 97, 399 P.2d 897 (1965) held California's quasi-community property statute (Civil Code Section 4803) constitutional, and that, therefore, the January 1, 1970 advent of "no-fault divorce" in California

renders this section unconstitutional. Appellant does not say why he should be allowed to here raise this contention which should have been advanced in his original action finalized in 1972.

Assuming for argument that Appellant's contention is timely and properly before this Court, Appellant's reading of *Addison*, supra, is erroneous. It is true that the *Addison*, supra, Court stated:

"In the case at bar it was Leona who was granted a divorce from Morton on the ground of the latter's adultery and hence it is the spouse guilty of the marital infidelity from whom the otherwise separate property is sought by the operation of the quasi-community property legislation. We are of the opinion that where the innocent party would otherwise be left unprotected the state has a very substantial interest and one sufficient to provide for a fair and equitable distribution of the marital property without running afoul of the due process clause of the Fourteenth Amendment. For the same reasons sections 1 and 13 of article I of the California Constitution, substantially similar in language, are not here applicable."

By the time it uses this language, however, the Court has already reached the conclusion that the California legislature was acting in furtherance of the public interest in its adoption of Civil Code Section 4803, and this relied-upon interest is clearly broader than the singular plight of "innocent" plaintiff Leona Addison. To quote the Court:

"It cannot be successfully argued that the quasi-community property legislation is unconstitu-

tional because of a violation of the due process clause of the federal Constitution. Morton has not been deprived of a vested right without due process. As Professor Armstrong has correctly pointed out in her article, *supra*: 'Vested rights, of course, may be impaired "with due process of law" under many circumstances. The State's inherent sovereign power includes the so called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people. The annals of constitutional law are replete with decisions approving, as constitutionally proper, the impairing of, and even the complete confiscation of, property rights when compelling public interest justified it.

"* * *

"The constitutional question, on principal, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably would be believed to be sufficiently necessary to the public welfare as to justify the impairment.' (Armstrong, 'Prospective' Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity" (1945) *supra*, 33 Cal.L.Rev. 476, 495-496.)

"Clearly the interest of the state of the current domicile in the matrimonial property of the parties is substantial upon the dissolution of the marriage relationship. This was expressly recognized by the United States Supreme Court in *Williams v. State of North Carolina*, 317 U.S. 287 at p. 298, 63 S.Ct. 207, at p. 213, 87 L.Ed. 279,

where it was said. 'Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal.'

Thus, Appellant's contention that in *Addison*, *supra*:

"... the Court must have assumed that the male in a dissolution proceedings (sic) is *ipso facto* the guilty party" (Appellant's brief, pp. 8-9)

is erroneous, and the Civil Rights Act of 1964 is not violated.

Indeed, Appellant's privileges and immunities and equal protection arguments similarly grounded, also fall upon a correct reading of *Addison*, *supra*.

Since the *Addison* (*supra*) decision cited state interests broader than the protection of "innocent" parties as justification for California's quasi-community property statute, the validity of that ruling stands unaffected by the 1970 proclamation of "no-fault divorce" in California.

The opinion in *Addison v. Addison*, *supra*, and the statute providing for the division of quasi-community property, Section 4803 California Civil Code, were correctly analyzed the California Court of Appeal in the opinion in this case. See Exhibit "A", Jurisdictional Statement.

Therefore, Appellant brings before this Court no substantial federal question.

Respectfully submitted,

COMINOS, SHOSTAK & EPSTEIN,

By THEODORE H. COMINOS,

Attorneys for Appellee.

November 29, 1976.

(Exhibits Follow)

Exhibits

Exhibit "A"

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Attorneys for Plaintiff

Superior Court of the State of California
County of Monterey

No. M 7133

Gay Gurs,	Plaintiff,
vs.	
Margot W. Gurs,	Defendant.

[Filed Aug. 12, 1975]

COMPLAINT FOR EQUITABLE RELIEF

Plaintiff alleges:

I

Plaintiff is a retired major of the military forces of the United States and prior to 1963 he was a resident of the State of Ohio. Since early 1963 he has been a resident of the State of California.

II

The Defendant is the former wife of the Plaintiff, and prior to 1963 she was a resident of the State of Ohio. She has been a resident of the State of California since early 1963.

III

On or about June 12, 1939, Plaintiff enlisted in the Ohio National Guard in Cleveland, Ohio and Plaintiff's unit was federalized on October 15, 1940 and thereupon Plaintiff was inducted into the active military service in the United States Army.

IV

Plaintiff and Defendant were married in Evansville, Indiana on October 6, 1949, which marriage was dissolved by the Memorandum Decision of the Honorable Ralph M. Drummond, one of the Judges of the Superior Court of the State of California in and for Monterey County in case No. MDR2456, dated April 20, 1972. Said Judgment was amended by the Court on May 17, 1972.

V

On the dates hereinafter indicated he was stationed as a member of the armed forces as follows:

October, 1940 to April 1942	Camp Shelby, Mississippi
April, 1942 to June, 1942	Fort Belvoir, Virginia
June, 1942 to May, 1943	Camp Crowder, Missouri
May, 1943 to December, 1944	U.S. Army in Europe
December, 1944 to October, 1945	Geiger Field, Washington

October, 1945 to November, 1946	U.S. Army in Germany
November, 1946 to May, 1947	Geiger Field, Washington
May, 1947 to May, 1950	U.S. Army in Germany
May, 1950 to June, 1951	Fort Riley, Kansas
June, 1951 to July, 1952	U.S. Army in Germany
July, 1952 to January, 1954	Fort Lewis, Washington
January, 1954 to July, 1957	U.S. Army in Germany
July, 1957 to August, 1957	Fort Hamilton, New York
August, 1957 to June, 1959	Fort Ord, California
June, 1959 to July, 1962	U.S. Army in Germany
July, 1962 to December 31, 1962	Fort Ord, California

VI

Plaintiff retired from service at Fort Ord, California on December 31, 1962. His length of service with the armed forces covered the period of June 12, 1939 to December 31, 1962, or approximately 23½ years, credited 24 years for pay purposes by the Department of the Army. During that time he and his at the time wife, were physically present in the State of California twice. The first period from August 20, 1957 to June 5, 1959, that is one year and nine and one-half months. Their second and only other stay in California was from July 31, 1962 to December 31, 1962 or five (5) months. Their total stay in California while he was in the service with the U.S. Army was two years and two and one-half months, or approximately 1/11th parts of his total service career.

VII

As a citizen of the State of Ohio, Plaintiff received a bonus from his home state for World War II par-

ticipation in 1950. He also received a bonus from his home state in 1957 for the Korean Conflict. While he was a citizen of Ohio, he was qualified to receive said bonuses. However, he was not qualified and did not receive any bonus from the State of California.

VIII

Plaintiff has in his possession various documents attesting to the facts hereinabove stated and he also has in his possession a document indicating that his name was changed from Serge Gurs to Gay Gurs which the latter name he is presently known by.

IX

During 1971 while Plaintiff and Defendant resided in the State of California, the Defendant filed her Petition for a Dissolution of Marriage in the Superior Court of the State of California, Monterey County, Case No. MDR2456. The Court acquired jurisdiction of Plaintiff herein (Respondent in the Dissolution matter) on August 24, 1971 and Memorandum of Decision was entered and filed on April 20, 1972 in which the Honorable Ralph M. Drummond, one of the Judges of the Superior Court, granted an Interlocutory Judgment of Dissolution of Marriage to Petitioner in the Dissolution case (Defendant herein) and among others he found that the military retirement pay of Plaintiff herein was community property and awarded to Defendant herein (Petitioner in Dissolution) $32\frac{1}{2}$ percent of said retirement pay and ordered that she should be given her share of $32\frac{1}{2}$

percent within 10 days after Plaintiff received his monthly payments.

X

Subsequently the Honorable Ralph M. Drummond, aforesaid Judge of the Superior Court, amended the Judgment referred to above in accordance with his Order of May 17, 1972 and reduced the amount payable to Defendant herein (Petitioner in Dissolution) her share in the Plaintiff's retirement pay to $13/48$ th part thereof. Said payment was based on the finding of the Court that Plaintiff served in the armed forces 24 years and that the parties were married during that time thirteen (13) years and that Defendant (Petitioner in Dissolution) was entitled to one-half of $13/24$ th or $13/48$ th part of the retirement pay.

XI

Plaintiff submits that while his service with the armed forces of the United States lasted for a period of 24 years, and while the parties were married during that time for 13 years, however the time spent by Plaintiff in the State of California amounted only to two years and two and one-half months or approximately $1/11$ th part of his total military service.

XII

Plaintiff further submits to the Court and requests that the Court take judicial notice of the fact that while the State of California is a community property state, the State of Ohio, of which Petitioner was a citizen during his military service, is a common law

and a non-community property state and therefore the awarding to Defendant (Petitioner in dissolution) 13/48th part of Plaintiff's military retirement pay deprives him of due process and of the equal protection of law under the Constitution of the State of California as well as of the United States.

Plaintiff is deprived of substantive due process of law as well as of equal protection of the law since there is no sufficient close nexus with any underlining policy objective which would pass constitutional muster. Plaintiff further alleges that the granting to Defendant (Petitioner in the Dissolution case) 13/48th part of his military retirement pay based on the 13 year marriage of the parties, deprives him of substantive due process of law and of equal protection of the law since as a resident of a common law state at the time when the retirement pay becomes vested in him, Defendant would have been entitled only to 2.2/48th part of his retirement pay and granting her a larger share is not rationally related to a legislative objective that it can be used to deprive Plaintiff of his status as a resident of a common law state. Because of that Plaintiff alleges that the action of the Court here granting Defendant 13/48th part of his military retirement pay is so arbitrary as to violate the constitution of the United States and of the State of California pursuant to the due process clause and the clause pertaining to equal protection.

Plaintiff submits that said Order of May 17, 1972 in equity and good conscience ought to be corrected so that Defendant (Petitioner in Dissolution) be

awarded not 13/48th part but only 2.2/48th part of the monthly payments received by Plaintiff as his military retirement pay.

XIII

Plaintiff also submits to the Court and requests that the Court take judicial notice of the fact that the State of Ohio of which Plaintiff and Defendant herein were residents at the time when Plaintiff retired from military service judicially determined that military retirement pay is the separate property of the person earning it and further that the Court of the State of California by comity ought to and does recognize the holding of such sister state.

XIV

Plaintiff further submits to the Court that the Defendant herein is a well qualified person to provide for her own living expenses. That she is an instructor of the German language at the Defense Language Institute (DLI) Presidio of Monterey, where she is employed and classified as a GS-9 earning approximately \$1,200.00 per month. That in addition thereto she receives other income amounting to approximately \$300.00 per month, a total of \$1,500.00 exclusive of any payment that the Superior Court of Monterey County ordered Plaintiff to pay her.

Plaintiff further submits that after he had retired from military service and subsequently thereto he became a Correctional Officer in the State of California assigned to the California Correctional Training Facility at Soledad, California where he earns ap-

proximately the same amount as Defendant does in her employment.

XV

Plaintiff submits that in equity and good conscience he is entitled to a further Order that the Defendant (Petitioner in the Dissolution) reimburse Plaintiff for the amounts which she wrongfully received between May 17, 1972 and the time of the Order to be entered herein. However, Plaintiff is willing to abandon any such claim and ask the Court for the Order:

1. That the amount payable to Defendant as her share of Plaintiff's military retirement pay be reduced from 13/48th part thereof to 2.2/48th part thereof;

2. That costs be awarded to Plaintiff; and,

3. That the Court enter such other and further Order that equity requires.

Dated: August 11, 1975.

/s/ Gay Gurs
Gay Gurs, Plaintiff

Heisler, Stewart, Silver & Daniels

By: /s/ Francis Heisler
Francis Heisler
Attorney for Plaintiff

Verification

State of California
County of Monterey—ss.

I am the Plaintiff in the above-entitled action; I have read the foregoing Complaint for Equitable Relief and know the contents thereof; and I certify that the same is true and correct of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I, Gay Gurs, declare under penalty of perjury that the foregoing is true and correct.

Executed on August 11, 1975, at Carmel, California.

/s/ Gay Gurs
Gay Gurs

Exhibit "B"

[1 C.3d 467; 82 Cal.Rptr. 489, 462 P.2d 17]

In the Supreme Court
of the
State of California
In Bank

S. F. No. 22695

Betty Richwhite Kulchar, Plaintiff and Appellant, vs. George Victor Kulchar, Defendant and Respondent.	}
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[Dec. 23, 1969]

OPINION

TRAYNOR, C. J.—Plaintiff appeals from an order of the Superior Court of San Mateo County modifying an interlocutory decree of divorce to relieve defendant of liability to pay federal income taxes assessed against the parties on income accruing to plaintiff in New Zealand.

Plaintiff secured an interlocutory decree of divorce from defendant on July 3, 1964. The decree included the disposition of the community and separate prop-

erty of the parties.¹ The decree provided, in part: "Defendant shall indemnify and hold plaintiff free and harmless in the matter of any monies due any taxing agency, whether Federal, State or County, for the calendar years prior to 1964."

In 1966, following the divorce proceedings, defendant received a tax assessment of approximately \$22,000 of federal income taxes based on theretofore undisclosed income accumulated during the marriage by a New Zealand corporation in plaintiff's name. Defendant moved to modify the divorce decree to relieve him of any liability for taxes on the New Zealand income on the grounds of extrinsic fraud and extrinsic mistake. After a hearing on defendant's motion, the trial court concluded that the tax provision in the decree "was included and approved by the parties as a result of the mutual mistake of the parties and further, that there was no intent of the parties that defendant should pay United States Federal income tax resulting from income to plaintiff in New Zealand." The court struck the tax provision from the decree "because of the mutual mistake of the parties."

Under certain circumstances a court, sitting in equity, can set aside or modify a valid final judgment. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575-576 [122 P.2d 564, 140 A.L.R. 1328]; *Caldwell v. Taylor* (1933)

¹There was no formal property settlement agreement. All provisions of the decree relating to the distribution of property were submitted to the court on the stipulation of the parties.

218 Cal. 471, 475 [23 P.2d 758, 88 A.L.R. 1194].) This power, however, can only be exercised when the circumstances of the case are sufficient to overcome the strong policy favoring the finality of judgments. "A basic requirement of an action which can lead to a valid judgment is that a procedure should be adopted which in the normal case will give to the parties an opportunity for a fair trial which is reasonable in view of the requirements of public policy in the particular type of case. If this requirement is met, a judgment awarded in an action is not void merely because the particular individual against whom it was rendered did not in fact have an opportunity to present his claim or defense before an impartial tribunal. . . . [P]ublic policy requires that only in exceptional circumstances should the consequences of res judicata be denied to a valid judgment." (Rest., Judgments, § 118, com. a.)

Interlocutory divorce decrees are res judicata as to all questions determined therein, including the property rights of the parties. (*In re Williams' Estate* (1950) 36 Cal.2d 289, 292 [233 P.2d 248, 22 A.L.R.2d 716]; *Adamson v. Adamson* (1962) 209 Cal.App.2d 492, 501 [26 Cal.Rptr. 236]. If a property settlement is incorporated in the divorce decree, the settlement is merged with the decree and becomes the final judicial determination of the property rights of the parties. (*Broome v. Broome* (1951) 104 Cal.App.2d 148, 154-155 [231 P.2d 171].) Thus, the rules governing extrinsic fraud and mistake apply to alimony awards and property settlements incorporated in divorce de-

crees. (*Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 18-23 [193 P.2d 728]; *Cameron v. Cameron* (1948) 88 Cal.App.2d 585, 595-597 [199 P.2d 443]; *Hosner v. Skelly* (1946) 72 Cal.App.2d 457, 461 [164 P.2d 573]; *Horton v. Horton* (1941) 18 Cal.2d 579, 584-585 [116 P.2d 605]; *Hendricks v. Hendricks* (1932) 216 Cal. 321, 323-324 [14 P.2d 83]; *Godfrey v. Godfrey* (1939) 30 Cal.App.2d 370, 378-380 [86 P.2d 357]; *Smith v. Smith* (1954) 125 Cal.App.2d 154, 161-164 [270 P.2d 613].)

Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been "deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense." (3 Witkin, Cal. Procedure, p. 2124.) "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the cast of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." (*United*

States v. Throckmorton (1878) 98 U.S. 61, 65-66 [25 L.Ed. 93, 95].)

The right to relief has also been extended to cases involving extrinsic mistake. (*Bacon v. Bacon* (1907) 150 Cal. 477, 491-492 [89 P. 317]; *Olivera v. Grace*, *supra*, at p. 577.) "In some cases . . . the ground of relief is not so much the fraud or other misconduct of the defendant as it is the excusable neglect of the plaintiff to appear and present his claim or defense. If such neglect results in an unjust judgment, *without a fair adversary hearing*, the basis for equitable relief is present, and is often called 'extrinsic mistake.'" (3 Witkin, Cal. Procedure, p. 2128.)

Extrinsic mistake is found when a party becomes incompetent but no guardian ad litem is appointed (*Olivera v. Grace*, *supra*, at p. 577; *Dei Tos v. Dei Tos* (1951) 105 Cal.App.2d 81, 84-85 [232 P.2d 873]; *Winslow v. McCarthy* (1918) 39 Cal.App. 337, 340 [178 P. 720]; when one party relies on another to defend (*Weitz v. Yankoski* (1966) 63 Cal.2d 849, 855-856 [48 Cal.Rptr. 620, 409 P.2d 700]; *Roussey v. Ernest W. Hahn, Inc.* (1967) 251 Cal.App.2d 251, 256 [59 Cal.Rptr. 399]); when there is reliance on an attorney who becomes incapacitated to act (*Jeffords v. Young* (1929) 98 Cal.App. 400, 405-406 [277 P. 163]; *Smith v. Busniewski* (1952) 115 Cal.App.2d 124, 127-128 [251 P.2d 697]; *Antonsen v. Pacific Container Co.* (1941) 48 Cal.App.2d 535, 538 [120 P.2d 148]), when a mistake led a court to do what it never intended (*Sullivan v. Lumsden* (1897) 118 Cal. 664, 669 [50 P. 777]; *Bacon v. Bacon*, *supra*, at pp. 492-493); when

a mistaken belief of one party prevented proper notice of the action (*Aldabe v. Aldabe* (1962) 209 Cal. App.2d 453, 475 [26 Cal.Rptr. 208]; *Boyle v. Boyle* (1929) 97 Cal.App. 703, 706 [276 P. 118]; or when the complaining party was disabled at the time the judgment was entered (*Watson v. Watson* (1958) 161 Cal.App.2d 35, 39-49 [325 P.2d 1011]; *Saunders v. Saunders* (1958) 157 Cal.App.2d 67, 72-73 [320 P.2d 131]; *Evry v. Tremble* (1957) 154 Cal.App.2d 444, 447-449 [316 P.2d 49]). Relief has also been extended to cases involving negligence of a party's attorney in not properly filing an answer (*Hallett v. Slaughter* (1943) 22 Cal.2d 552, 556-557 [140 P.2d 3]; *Turner v. Allen* (1961) 189 Cal.App.2d 753, 757-760 [11 Cal. Rptr. 630]); and mistaken belief as to immunity from suit (*Bartell v. Johnson* (1943) 60 Cal.App.2d 432, 436-437 [140 P.2d 878]).²

Relief is denied, however, if a party has been given notice of an action and has not been prevented from participating therein. He has had an opportunity to present his case to the court and to protect himself from mistake or from any fraud attempted by his adversary. (*Jorgenson v. Jorgenson*, *supra*, 32 Cal.2d 13 at p. 18; *Westphal v. Westphal* (1942) 20 Cal.2d 393, 397 [126 P.2d 105]; *Gale v. Witt* (1948) 31 Cal.

²The decisions in both *Hallett* and *Bartell* have been criticized. (See Comment (1943) 31 Cal.L.Rev. 600.) "The cases on *intrinsic fraud*, involving perjury, false documents and other reprehensible conduct by the adverse party, are far more compelling, yet relief is uniformly denied for good reason. . . . The *Hallett* and *Bartell* cases involve no true extrinsic factors in the accepted sense, and they raise serious questions as to the practical finality of any default judgment." (3 Witkin, Cal. Procedure, p. 2130.)

2d 362, 367 [188 P.2d 755]). Moreover, a mutual mistake that might be sufficient to set aside a contract is not sufficient to set aside a final judgment. The principles of res judicata demand that the parties present their entire case in one proceeding. "Public policy requires that pressure be brought upon litigants to use great care in preparing cases for trial and in ascertaining all the facts. A rule which would permit the re-opening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the effects of the rules of res judicata." (Rest., Judgments, § 126, com. a.) Courts deny relief, therefore, when the fraud or mistake is "intrinsic"; that is, when it "goes to the merits of the prior proceedings, which should have been guarded against by the plaintiff at that time." (Comment, *Equitable Relief From Judgments, Orders and Decrees Obtained by Fraud* (1934) 23 Cal.L.Rev. 79, 83-84; see *Pico v. Cohn* (1891) 91 Cal. 129, 134 [27 P. 537, 25 Am.St.Rep. 159, 13 L.R.A. 336]; *Hendricks v. Hendricks*, *supra*, at pp. 323-324.)

Relief is also denied when the complaining party has contributed to the fraud or mistake giving rise to the judgment thus obtained. (*Hammell v. Britton* (1941) 19 Cal.2d 72, 80 [119 P.2d 333]; *Rudy v. Slotwinsky* (1925) 73 Cal.App. 459, 465 [238 P. 783]; Rest. Judgments, § 129.) "If the complainant was guilty of negligence in permitting the fraud to be practiced or the mistake to occur equity will deny relief." (*Wilson v. Wilson* (1942) 55 Cal.App.2d 421, 427 [130 P.2d 782].)

Whether the case involves intrinsic or extrinsic fraud or mistake is not determined abstractly. "It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case." (*Jorgensen v. Jorgensen*, *supra*, 32 Cal.2d 13 at p. 19.)

The evidence in the present case establishes that it is a case in which a party "failed to assemble all his evidence at the trial." Defendant testified that he knew of the New Zealand holdings prior to the divorce and that plaintiff was receiving \$640 every four months from New Zealand. In defendant's divorce questionnaire, circulated to determine the extent of marital property holdings, expenses and income, he listed as plaintiff's separate property "50% stock interest in David Lloyd Co., Ltd.—a New Zealand holding corporation for many subsidiary companies (cement, coal, paper)—exact worth unknown to defendant—estimate to run into millions of dollars." In a letter sent by defendant's attorney to plaintiff's attorney in which the principal points of the property settlement were summarized, defendant proposed to transfer to plaintiff "any interest he may have in her holdings in New Zealand." Plaintiff also knew of the holdings but did not know of their value or their tax consequences. In 1957 when preparing income tax returns, an attorney, who later represented defendant

in the divorce action, made some inquiry into the nature of the New Zealand income at the request of defendant. The attorney abandoned further investigation after plaintiff stated that a law firm known to defendant's attorney had advised her that the New Zealand income was not taxable. The attorney knew that the New Zealand holdings were "sizable." Both parties testified that the tax provision was included in the decree because of an audit being conducted by the Internal Revenue Service with respect to an unrelated transaction by defendant.

Clearly the present case does not involve the failure of one spouse to disclose fully the assets to be divided upon separation. (See *Taylor v. Taylor* (1923) 192 Cal. 71 [218 P. 756, 51 A.L.R. 1074]; *Milekovich v. Quinn* (1919) 40 Cal.App. 537 [181 P.2d 256]. The duty to disclose arises out of the fiduciary relationship between the husband and wife. (*Vai v. Bank of America* (1961) 56 Cal.2d 329, 337-340 [15 Cal.Rptr. 71, 364 P.2d 247]; *Jorgensen v. Jorgensen*, *supra*, 32 Cal.2d 13 at pp. 19-21.) There is no evidence that the wife withheld any information relevant to the nature of her New Zealand income.

The factual situation in the present case is analogous to that in *Jorgensen v. Jorgensen*, *supra*. In *Jorgensen* the husband disclosed all known assets of the parties. The husband claimed certain assets as his separate property. The wife and her attorney accepted the husband's statements at face value without any independent investigation. Subsequent to the divorce decree, however, they learned that some of the

assets the husband claimed as separate property were actually community property, in which the wife was entitled to a one-half interest. The wife was denied the right to set aside the property settlement agreement. "If the wife and her attorney are satisfied with the husband's classification of the property as separate or community, the wife cannot reasonably contend that fraud was committed or that there was such mistake as to allow her to overcome the finality of a judgment. . . . Plaintiff is barred from obtaining equitable relief by her admission that she and her attorney did not investigate the facts, choosing instead to rely on the statements of the husband as to what part of the disclosed property was community property." (*Jorgensen v. Jorgensen*, *supra*, 32 Cal.2d 13 at pp. 22-23; see also, *Cameron v. Cameron*, *supra*, 88 Cal.App.2d 585 at pp. 595-597 wherein the holding of *Jorgensen* was found controlling.)

In the present case both parties knew of the New Zealand assets, but the husband and his attorney chose not to investigate their taxability. The property settlement agreement expressly covered unknown tax liability. Having had full opportunity to consider all income of the wife and its concurrent tax consequences, the husband cannot now complain of the added tax burden.

The order is reversed.

Peters, J., Torbriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

McCOMB, J.—I dissent I would affirm the order of the trial court.